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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

No. 541

NATIONAL SURETY CORPORATION, a corporation
Petitioner,

vs.

W. T. MUSGROVE and WILLIAM R. CADENHEAD, Individually and as Partners Doing Business as Musgrove Insurance Agency, Gladys Holmes Southwick formerly Gladys Leith Holmes), and CONTINENTAL CASUALTY COMPANY, a corporation,
Respondents

BRIEF

Of Respondents, W. T. MUSGROVE and WILLIAM R. CADENHEAD, Individually and as Partners Doing Business as Musgrove Insurance Agency, in Opposition.

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Code of Alabama, 1940:
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1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 132 — 9
5 Moore's Federal Practice, Sec. 38.39 [3] — 9

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STATUTES INVOLVED.

Insofar as the right of Petitioner to a non jury trial is concerned the Federal Rules of Civil Procedure [Rules 57, 38 (a) and (b), 39 (a) and (b), and 81 (c), as amended January 21, 1963] are involved and not the Alabama Code provisions cited by Petitioner. By virtue of Rule 81 (c), Title 7, Section 260, Code of Alabama is also involved.

The above rules and statute are as follows:

"Rule 57.

"DECLARATORY JUDGMENTS

"The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C., Sec. 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, eff. Oct. 20, 1949."

"Rule 38.

"JURY TRIAL OF RIGHT

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time

after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

" **Rule 39.**

" **TRIAL BY JURY OR BY THE COURT**

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or on its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

"(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its

discretion upon motion may order a trial by a jury of any or all issues."

" **Rule 81.**

" **APPLICABILITY IN GENERAL**

"(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after the service on him of the notice of filing the petition. A party who, prior to

removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury."

Alabama Code.

"Sec. 260. (9498, 9502) (5359) (3319) (2743) (3029) Trial Without Jury. — All civil cases at law shall be tried and determined by the court without a jury unless the plaintiff indorses in writing his demand for a trial by jury on the summons and complaint, attachment, or other process or paper filed by him for the purpose of instituting the suit, or by filing a separate written demand with the clerk of the court at the commencement of the suit, **or unless the defendant or other party occupying the position of defendant shall demand in writing a trial by jury within thirty days**

after the perfection of service on him, or unless the claimant shall demand in writing a trial by jury at the time of the filing of his claim. On defendant's default, the plaintiff may withdraw his demand for a jury, if any, and have his damages ascertained by the court without the intervention of a jury. Either party to a civil cause tried by the court without the intervention of a jury may present for review the conclusions and judgment of the court on the evidence and the court of appeals or supreme court shall review the same without any presumption in favor of the court below; either on the rulings on the law or conclusions on the evidence, and if there be error, shall render such judgment in the cause as the court below should have rendered or reverse and remand the same for further proceedings in the trial court as the court of appeals or supreme court may deem right. The finding of the court on the facts shall be subject to review without an exception thereto. (1915, pp. 824, 939; 1953, p. 103, appvd. June 10, 1953.)" (Boldface ours)

STATEMENT OF THE CASE.

Petitioner first claims a denial of the right to a non jury trial. The statement of the case relating to such claim is incorrect and incomplete.

On October 7, 1960, these respondents filed the complaint here involved in the Circuit Court of Lauderdale County, Alabama (R. 2). Petitioner, Gladys Holmes Southwick, and Continental Casualty Company were named as the respondents. On November 3, 1960, Mrs. Southwick filed an appearance in the State Court demanding a trial by jury (R. 61-62). A certified copy of this appearance and jury demand were filed in the District Court on March 3, 1961. This jury demand was not included in the petition for removal, having been filed subsequent thereto (R. 1-37). (Record shows no service of removal petition on respondent Southwick.)

The petition for removal (filed on October 14, 1960) also sought the re-alignment of the parties (R. 1-5). In this respect stating at R. 5:

> "Wherefore, your petitioner prays that this action be removed and that the defendants, **Gladys Holmes Southwick and Continental Casualty Company, be re-aligned as party plaintiffs along with W. T. Musgrove and William R. Cadenhead, individually, and as partners doing business as Musgrove Insurance Agency.**"
>
> (Boldface ours)

In overruling motion of these respondents to remand this cause to the State Court the

District Court re-aligned Mrs. Southwick as a party plaintiff (R. 50-59). At R. 58: "For the purpose of this suit, Mrs. Southwick should be aligned with the plaintiffs."

The record shows that the trial proceeded before the District Judge and a jury with Petitioner defending against the claims of these respondents and Mrs. Southwick as so aligned at its request (R. 71).

In respect to the evidence relating to Questions 2 and 3 of the petition, we refer to the recitation of facts in the opinion of the Fifth Circuit in this case (310 F 2d 256 — Appendix A, Page 31, of Petition). Incidentally, the opinion was written by Circuit Judge Wisdom, one of the Fifth Circuit Judges before whom Continental Casualty Company v. Mrs. Gladys Leith Holmes was reviewed (266 F 2d 269, App. A, Pg. 44, Petition).

ARGUMENT.

The record reflects that Petitioner's argument is based on an incorrect statement of the facts. Mrs. Southwick did file a jury demand by indorsing such demand on her initial pleading in this case (R. 61-62) in conformity with Rule 38 (b) (supra). Mrs. Southwick was a plaintiff in this case. She was made a plaintiff at Petitioner's request.

It is true Mrs. Southwick's jury demand was filed in the State Court and was not filed in the District Court until March 3, 1961 (R. 61-63). Rule 81 (c), as amended, provides that a party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. This provision is in accord with this Court's "scrupulous preservation" of right to jury trial under Rule 57. Beacon Theatres v. Westover (1958), 359 U S 500, 3 L Ed 2d 988, 79 S Ct 948. Conversely, the Beacon case (supra) illustrates that the right to a trial by court is not protected. "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trial by the court * * *." (3 L Ed 2d 997 and cases footnoted under 17).

Prior to the adoption of the referred to provision of Rule 81 (c), most of the federal courts held that a party who has made a proper express demand for jury trial in the State Court is not required to renew the demand after removal of the action. Zakoscielny v. Waterman Steamship Corp., 16 F RD 314 (D. Md. 1954); Talley v. American Bakeries Co., 15 F R D 391 (E. D. Tenn. 1954); Rehrer v. Service Trucking Co., 15 F R D 113 (D. Del. 1953); 5 Moore's Federal Practice Sec. 38.39 [3] (2d ed. 1951); 1 Barron & Holtzoff, Federal Practice and Procedure, Sec. 132 (Wright ed. 1960).

Petitioner's attempt to apply Alabama procedure as relating to jury trials is erroneous. Without conceding the correctness of Petitioner's analysis of the subject Alabama law, we say it is of no moment because Federal law applies.

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, **assigns the decisions of disputed questions of fact to the jury.** It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge - jury relationship in the federal courts." Byrd v. Blue Ridge Rural Electric, 356 U S 525, 2 L Ed 2nd 953, 78 S Ct 893.

In reversing the judgment of the above case, this Court held that on the new trial the question whether the electric company was entitled to the immunity accorded by the South Carolina statute was to be decided by the jury, notwithstanding South Carolina's decisions holding this question to be one for the Court.

Petitioner does not cite the recent case of

Simler v. Conner, U S , 9 L Ed 2d 691, 83 S Ct (March 11, 1963 Advance Reports). In a Per Curiam opinion, the Simler case holds that Federal law governs in determining the right to a jury trial in federal courts.

More importantly, the above case puts at rest the question of "equitable cognizance" argued so extensively by Petitioner. Holding that the characterization of that State-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to Federal law.

Both Petitioner and District Court identified Mrs. Southwick's interests with those of these respondents. Engaging in trial on that premise, Petitioner now seeks certiorari under the remedial and cumulative right given by Title 28, Section 12, 1940 Code of Alabama to an injured party to reach the proceeds of a liability insurance policy. The issue was whether or not there was a policy of insurance. All injured parties have an interest in that issue. The fact that the action was in form a declaratory judgment case should not obscure the essentially legal nature of such an issue. Simler v. Conner (supra).

Rule 38 prescribes that jury trial as declared by the Seventh Amendment shall be preserved to the parties inviolate; that any

party may demand a trial by jury of any issue triable of right by a jury and such demand may be indorsed upon a pleading of the party.

CONCLUSION.

There has been no denial of any right of Petitioner in this cause. It has had many days in court.

The writ should be denied.

Respectfully submitted,

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MITCHELL, POELLNITZ & COX,
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CERTIFICATE.

I hereby certify that a true copy of the foregoing brief in opposition to petition for writ of certiorari has been served upon Mr. James E. Clark, 1103 City Federal Building, Birmingham, Alabama, Attorney of Record for National Surety Corporation. I also certify that a true copy thereof has been served upon Messrs. Lange, Simpson, Robinson & Somerville, Attention Mr. Reid Barnes, Exchange Security Bank Building, Birmingham 3, Alabama, Attorneys of Record for Continental Casualty Company. I further certify that a true copy thereof has been served upon Messrs. Hare, Wynn & Newell, Attention Mr. Francis Hare, Seventh Floor City Federal Building, Birmingham 3, Alabama, Attorneys of Record for Mrs. Gladys Holmes Southwick (formerly Mrs. Gladys Leith Holmes).

This 10th day of December, 1963.

Charles A Pickett

Counsel for said Respondents